STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

KRISTOPHER ALLEN HUGHES

Defendant-Appellant
_____/

Supreme Court No. 158652

Court of Appeals No. 338030

Lower Court No. 16-260154 FC

OAKLAND COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant
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SUPPLEMENTAL BRIEF

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Statement of Jurisdiction

Kristopher Allen Hughes adapts his Statement of Jurisdiction from his *Pro Per* Application for Leave to Appeal. In addition, jurisdiction is proper because this Court ordered arguments on the application for leave to appeal and directed the parties to file supplemental briefing on November 1, 2019. See *People v Kristopher Allen Hughes*, ___ Mich ___ (2019).

Statement of Questions Presented

I. Did the affidavit in support of the search warrant issued during the concurrent criminal investigation into drug trafficking authorize police to obtain all of Mr. Hughes's cell phone data?

Court of Appeals answers, "Yes."

Kristopher Allen Hughes answers, "No."

II. Whether Mr. Hughes's expectation of privacy in his cell phone records and data was extinguished by his trial attorney's failure to file a motion to suppress in a concurrent criminal investigation that was resolved in a plea?

Court of Appeals answers, "Yes."

Kristopher Allen Hughes answers, "No."

III. Was the search of the cell phone data in the instant case within the scope of probable cause underlying the search warrant issued during the concurrent criminal investigation into drug trafficking?

Court of Appeals answers, "Yes."

Kristopher Allen Hughes answers, "No."

IV. Was the search of the cell phone data in the instant case lawful?

Court of Appeals answers, "Yes."

Kristopher Allen Hughes answers, "No."

V. Was trial counsel ineffective for failing to file a motion to suppress the results of the forensic examination of Mr. Hughes's cell phone?

Court of Appeals answers, "No."

Kristopher Allen Hughes answers, "Yes."

Statement of Facts

Introduction

Kristopher Hughes was tried three times before a jury found him guilty of armed robbery. The charges related to allegations Mr. Hughes and Lisa Weber, a sex worker, planned a robbery of Ronald Stites' home in Pontiac. Ms. Weber, who was paid money by Mr. Stites to do sex acts at his home and admitted to being addicted to crack cocaine, denied involvement in the robbery and was characterized by the prosecution as a "disputed accomplice" with serious credibility concerns. (App N 140a, 373a-379a, 401a-405a).[1] The issue at trial was not whether a robbery occurred, but who committed the crime.

To prove Mr. Hughes was the individual who committed this offense, the prosecution relied on the testimony of Lisa Weber and evidence recovered from Mr. Hughes's cell phone. (App N 139a-143a). The phone records provided a "link" between Weber and the August 6, 2016 incident. (App N 142a-143a). The records showed communications between Mr. Hughes's and Ms. Weber's phones on the night of the robbery, including several texts messages and 19 calls. During closing argument, the prosecution argued the cell phone removed all doubt as to the identity of the individual who committed the armed robbery. (App N 373a-379a, 401a-405a).

[1] Citations to the Appendix are referenced by letter (i.e. "App A") and page number. For example, the second day of trial is included as "Appendix N" and will be referred to as "App N."

Mr. Hughes's phone was obtained pursuant to a search warrant for his home and for electronic devices. The reason cited for searching the warrant application for Mr. Hughes's phone was (1) evidence from a confidential informant that Mr. Hughes was involved in drug trafficking activity and (2) the affiant's training and experience that "drug traffickers commonly use electronic equipment to aid them in their drug trafficking activities." (App E 38a-42a). The search warrant affidavit did not contain any information that a phone was used to commit the alleged drug trafficking offenses, or that Mr. Hughes even owned a phone. No motion to suppress was filed.

Robbery – August 6, 2016

- *Ronald Stites*

On August 6, 2016, Ronald Stites was living in a house on Rutgers in Pontiac. (App N 152a). That evening, while on a short walk to Baldwin Road, Mr. Stites encountered Lisa Weber. (App N 154a-155a). The two spoke and Ms. Weber, a known sex worker in the area, informed him she had been to his house before. (App N 155a). Mr. Stites claimed he did not recall ever having her at his house, but invited her there because, he testified, she told him she needed money for food and something to drink. (App N 156a).

Mr. Stites testified that once back at the house, the two of them discussed having sex in exchange for money even though, he claimed, she never mentioned being a sex worker. (App N 157a). Eventually, they agreed she would "stay all night for $50," and they performed sex acts after Mr. Stites retrieved cash from his safe.

(App N 158a). According to Mr. Stites, the safe contained approximately $4,000 in cash and other valuables and personal items. (App N 159a).

After Mr. Stites performed oral sex on Ms. Weber, she went to a nearby store to get something to drink. (App N 165a). Approximately 15-20 minutes later, Ms. Weber returned and suggested they call someone to get some drugs. (App N 165a). Later, a black male came to his house to deliver the drugs. (App N 170a).

When the man arrived, Ms. Weber let him into the home. (App N 171a). According to Mr. Stites, the individual "never hardly faced" him and, as a result, he never got "a good look at him." (App N 171a). Mr. Stites testified the individual was wearing a light jacket, blue jeans, and a baseball hat. (App N 171a-172a). The man never spoke to him, and Mr. Stites watched television while the deal was completed. (App N 172a). Mr. Stites could not recall whether he gave Ms. Weber additional money for the drugs. (App N 172a).

After the man left, Mr. Stites locked his front door and the two of them went back to the bedroom to "resume [their] sexual stuff" and consumed some of the recently-delivered drugs. (App N 173a-174a). Mr. Stites claimed he did not smoke the crack cocaine, but only had Ms. Weber take a puff and blow it into his mouth. (App N 174a).

After they used the cocaine, Ms. Weber informed Mr. Stites she needed a drink and left him in the bedroom alone. (App N 175a). Shortly thereafter, she returned, and he resumed performing oral sex on her. (App N 176a). Approximately one minute

later, Ms. Weber jumped away from him and a man with a handgun appeared in the room. (App N 176a).

The man ordered Mr. Stites to turn over and put his face on the bed or he would shoot him. (App N 177a-178a). Mr. Stites testified he could not recall seeing this man from anywhere before, but testified the man was black and wearing blue jeans, a light jacket, and a baseball hat. (App N 177a). Mr. Stites also heard Ms. Weber tell this individual the money was in the safe and that the keys to the safe were in the closet. (App N 179a-180a). Ms. Weber and the man then attempted to open the safe and tied Mr. Stites up. (App N 181a-182a). Ms. Weber and the man then left, taking the safe with them. (App N 183a).

After Ms. Weber and the man who robbed him left, Mr. Stites untied himself, got the keys to his moped, and went to a nearby 7-11 to call the police. (App N 185a). In the call, he told the dispatcher that Ms. Weber and the man arrived in a vehicle, but he testified he never observed any vehicle and only encountered Ms. Weber on foot. (App N 191a). Later, the police arrived at his home and he gave a description of Ms. Weber and the unidentified black male to them. (App N 188a). In his yard, police recovered the owner's manual for the safe, which contained the combination. (App N 188a). The police also collected several items, including the remote control, a coffee cup, and the rope. (App N 194a).

Mr. Stites later identified Ms. Weber as the individual he had paid for sex in a photographic lineup. (App N 195a-196a). He could not identify Mr. Hughes as the

individual who either sold them drugs or the individual who robbed him. (App N 196a).

- *Lisa Weber*

For her part, Lisa Weber testified she was struggling with an addiction to crack cocaine at the time of the robbery. (App N 218a). As a result of this addiction, she stole from family members and began "prostituting for the dope." (App N 218a).

Similar to Mr. Stites, Ms. Weber testified the two of them met while walking down Baldwin Road. (App N 220a). Ms. Weber, however, claimed Mr. Stites directly asked her to exchange sex for money. (App N 220a). Ms. Weber informed him she went to his house on a prior occasion, but Mr. Stites did not remember. (App N 220a). Ms. Weber, who had already used crack cocaine that day, then agreed to go to his house. (App N 221a-222a).

Once inside, Mr. Stite paid her $50 in exchange for sex and told her he wanted her to stay the night. (App N 224a). Ms. Weber told him it would be more to spend the night, but accepted the $50. (App N 224a). Before performing any sexual acts, Ms. Weber claimed she went to the store, got some drugs, and smoked them. (App N 225a-226a). She then returned to Mr. Stites house, the two of them discussed getting crack, and Ms. Weber made a call to an individual she knew as "K-1, Killer" to purchase the drugs from him. (App N 226a). She identified "K-1" or "Killer" as Mr. Hughes. (App N 227a).

According to Ms. Weber, Mr. Hughes then arrived at Mr. Stites' home to deliver the crack. (App N 228a). Ms. Weber made the exchange with Mr. Hughes with money

she obtained from Mr. Stites. (App N 228a-229a). Ms. Weber claimed Mr. Hughes left and she and Mr. Stites consumed the crack. (App N 230a).

After using the drugs, they went into Mr. Stites' bedroom where he performed oral sex on her. (App N 230a-231a). A few minutes later, Ms. Weber claimed Mr. Hughes walked into the bedroom with a gun, pointed it at them, and told her to tie up Mr. Stites. (App N 231a). She testified she complied because Mr. Hughes threatened to kill Mr. Stites if she did not. (App N 231a).

Ms. Weber claimed Mr. Hughes then attempted to open the safe. (App N 232a). After he was unsuccessful, Ms. Weber told him that the keys to the safe were in the closet, after which Mr. Hughes left with the safe. (App N 232a-233a). Ms. Weber grabbed her clothes and left the home. (App N 234a). She claimed she did not call the police because she was afraid. (App N 234a).

On August 16, 2016, Ms. Weber was interviewed by the police. (App N 235a). During the time between this interview and the robbery, Ms. Weber claimed, she communicated with Mr. Hughes at least once about purchasing narcotics. (App N 235a-236a). In one exchange, she claimed Mr. Hughes gave her money which she used to purchase drugs from him. (App N 237a). She believed he gave her the money to not contact the police. (App N 237a). She provided this information to the police during her interview and identified Mr. Hughes as the individual who committed the robbery. (App N 238a).

Later, in November 2016, the police contacted Ms. Weber about text messages and calls she allegedly exchanged with Mr. Hughes. (App N 242a-243a). Ms. Weber

had no independent memory of these communications during the interrogation or at trial. (App N 243a-244a).

Police Response

Deputy Che McNeary responded to the dispatch about the robbery. He seized the rope, coffee cup, owner's manual for the safe, and the remote control for Mr. Stites' television. (App N 282a). He forwarded these items for testing. (App N 291a).

Police Interviews of Ms. Weber

On August 16, 2016, Lieutenant Steven Troy interviewed Ms. Weber concerning the robbery. (App N 296a). According to Lieutenant Troy, Ms. Weber informed him she met with Mr. Stites that evening and agreed to exchange money for sex. (App N 296a). She told him that, prior to having sex, they arranged to buy crack cocaine from a man she knew as "Killer." (App N 296a-297a). She told Lieutenant Troy "Killer" sold them drugs and later robbed Mr. Stites. (App N 296a-300a). After being shown a photo of Mr. Hughes, she identified him as "Killer." (App N 299a).

Months later, in November 2016, Lieutenant Troy interviewed Ms. Weber again about the results of a forensic analysis of a cell phone recovered from Mr. Hughes' home. (App N 300a). The analysis of those phone records showed Ms. Weber had contact with Mr. Hughes about a television. (App N 300a). Ms. Weber told him she could not recall the texts or calls due to her heavy drug use but did not deny making them. (App N 301a).

Search Warrant for Mr. Hughes' Home

On August 11, 2016, Detective Matthew Gorman obtained a warrant to search Mr. Hughes's home. (App E 29a-44a). As part of this warrant, Detective Gorman sought to seize drugs and drug paraphernalia. (App E 30a). In addition to items directly connected to drug trafficking, the warrant also allowed "any cell phones or computers or other devices capable of digital or electronic storage seized" to be "forensically searched and or manually searched, and any data that is able to be retrieved there from shall be preserved and recorded." (App E 30a).

To support his request for this warrant, Detective Gorman provided information he obtained from a confidential informant, who purportedly claimed Mr. Hughes and another individual named Patrick Pankey, were members of an organization that was involved in "arranging the processing and distribution of large scale quantities of crack cocaine and other narcotics from local sources to Oakland County for distribution." (App E 39a). The warrant application also included information connecting Mr. Hughes's residence with these alleged sales. (App E 39a-44a).

The warrant affidavit contained no facts concerning the use of cell phones to conduct the alleged drug trafficking activity specifically by Mr. Hughes. In addition, there was no separate warrant obtained to authorize the search of any cell phone seized. Instead, Detective Gorman stated that, based on his training and experience,

> That drug traffickers commonly use electronic equipment to aid them in their drug trafficking activities. This equipment includes, but is not limited to, digital display pagers, mobile telephones, electronic telephone books, electronic date books,

> computers, computer memory disks, money counters, electronic surveillance equipment, eavesdropping equipment, police radio scanners, and portable communication devices.

(App E 38a-39a).

Execution of Search Warrant at Mr. Hughes' Residence

On August 12, 2016, Deputy Charles Jancza was part of a team that executed a search warrant at Mr. Hughes' home. (App N 318a). During the execution of this search warrant, he seized a phone that was in Mr. Hughes' possession. (App N 319a). Deputy Jancza explained that he recovered the phone from Mr. Hughes after he pulled into the driveway of the residence and conducted a "pat down search" of his person outside of the home. (App N 321a).

Forensic Examination of Mr. Hughes' Cell Phone

Detective Edward Wagrowski testified as an expert in cell phone forensics and examination. On August 23, 2016, Detective Wargoski performed a forensic exam on the cellular phone recovered from Mr. Hughes. (App N 325a). To perform this examination, Detective Wagrowski used Cellebrite, a device designed to extract all the data from the phone. (App N 325a-326a).

Detective Wagrowski generated a report containing any and all data extracted from the phone. (App N 327a; App G 48a-51a). This information included, text messages, call logs, photographs, and other data. (App N 327a). According to Detective Wagrowski, the report was over 600 pages long and contained "over 2,000 call logs, [] over 2,900 text message[s], or SMS messages, and over 1,000 pictures." (App N 329a).

Due to the size of the report, Detective Wagrowski was asked to narrow the focus of the report to three phone numbers – two belonging to Ms. Weber and one belonging to Mr. Stites. (App N 329a). Detective Wagrowski searched the records for words such as "Lisa," "Killer," "Kill," "Kris," and other variations of the word "Kill." (App N 334a-338a). The results of these searches were introduced at trial as Prosecution Exhibits 4-6 and 9-15. (App G 48a-51a; App H 52a-57a; App I 58a-63a).

Through the text messages, the prosecution was able to show communications between the phone associated with Mr. Hughes and Ms. Weber on the day of the robbery and after the robbery. (App G 48a-51a; App H 52a-57a). The texts leading up to the robbery included communications to and from Ms. Weber that she was "Getting 50 be there in 1," where Mr. Stites' home was located, where she was located in the home with Mr. Stites, that the door to Mr. Stites' home was "unlocked," and that Mr. Stites had a "flat screen TV." (App G 48a-51a; App H 52a-57a). For his part, Mr. Hughes phone sent texts instructing Ms. Weber to "Text me or call me" and to "Open the doo[r]." (App H 52a-57a). The call log, which was introduced as Prosecution Exhibit 4, also showed Mr. Hughes's phone exchanged 19 calls with Ms. Weber on the night of the robbery. (App H 53a).

In addition to the text messages associated with the night of the robbery, the prosecution also presented evidence of unrelated communications with other individuals prior to the robbery. (App H 55a-57a). These texts either had the phone associated with Mr. Hughes or others referring to Mr. Hughes as "Killer," "Kill," "Kris," "Kristopher" and other variations of the word "Kill." (App N 334a-338a; App

H 55a-57a). The conversations included arguments with individuals with whom he seemingly had a dating relationship, and one indicating that the sender served 20 years in prison for killing someone who had tried to rob him. (App H 55a-57a).

Opening and Closing Statements

During opening statements, the prosecutor acknowledged the only question for the jury to resolve was "whether it was the defendant who was the male part of that armed robbery who was armed with a weapon on August 6, 2016." (App N 138a). To prove the identity of this individual, the prosecution told the jury they could rely on (1) the testimony of Lisa Weber; and (2) evidence recovered from Mr. Hughes's cell phone. (App N 139a-143a).

> I submit to you that when you take Lisa Weber's testimony in conjunction with the physical evidence that was achieved through the forensic analysis of the cell phone found on Mr. Hughes, you will come to the determination that as it relates to the identity of the person who was involved in the armed robbery on August [6], beyond a reasonable doubt you will find that it is the defendant Kristopher Hughes.

(App N 143a).

According to the prosecution, the phone records provided a "link" between Ms. Weber, Mr. Hughes, and the incident on August 6, 2016. (T II 16-17). The records also helped to bolster the credibility of Ms. Weber, which the prosecution acknowledged was a serious "concern" because she had denied assisting in the robbery in any way. (T II 247-253; 275-279). As a result, the prosecution cast Ms. Weber as a "disputed accomplice" to the crime. (App N 140a).

> But, ladies and gentlemen what is particularly relevant and particular significant given the testimony that you've heard

> and the evidence that you've heard in this case are the text messages, the timing, and the nature of those text messages when you look at Mr. Stites' testimony, Lisa Weber's testimony, Lieutenant Troy's testimony, and the documented evidence such as the 911 and the extraction reports from Detective Wagrowski. All of that should give you great confidence in making the determination that if you believe nothing else about Lisa Weber's testimony, she is telling you the truth about who it was that was there with her at Mr. Stites' home and who came in armed with the gun and stole the safe or helped her steal the safe.

(App N 377a).

Indeed, in rebuttal closing argument, the prosecution even encouraged the jury to "take Lisa Weber out of the equation all together" when evaluating whether the evidence was sufficient to convict Mr. Hughes. (App N 398a). For the prosecution, the cell phone removed all doubt as to the identity of the individual who committed the armed robbery. (App N 373a-379a; 401a-405a).

Juror Notes

The first two trials ended in a mistrial due to deadlocked juries. Before the court granted the two mistrials, the jurors sent notes listing their concerns or disputes about the evidence that prevented them from reaching a verdict. In each case, the primary reason the jury was not able to reach a verdict related to the credibility (or lack thereof) of Ms. Weber. (App J 64a-81a; App K 82a-96a). In the first trial the jurors stated "Mrs. [sic] Weber's testimony was not credible (according to some) and she was the only one to positively identify Mr. Hughes from that night." (App J 75a). In the second trial, the jury also sent a note listing their "concerns" about

the evidence. (App K 85a). The first item on that list said "100% of Lisa W. testimony is untrue." (App K 85a).

Concurrent Prosecutions

The evidence obtained pursuant to the search warrant for Mr. Hughes's home and electronic devices resulted in two criminal prosecutions – one related to drug trafficking, No. 16-260213-FH, and the other to the robbery of Mr. Stites's home, No. 16-260154-FC. While Mr. Hughes's opted to take the armed robbery case to trial, he ultimately decided to enter a guilty plea in the drug trafficking case. Mr. Hughes was arraigned in both cases on August 17, 2016 and was sentenced in both cases on March 27, 2017. (App A 2a; App C 14a; App P 435a-448a).

- *Plea Case*

On February 2, 2017, Mr. Hughes pled no contest to two counts of delivery and manufacturing of a controlled substance less than 50 grams, controlled substance second or subsequent offense, possession of suboxone, possession of alprazolam, and possession of dihydrocodeine pills as a habitual fourth. (App L 103a). The deal included a *Cobbs* agreement to a minimum term of no more than 36 months. (App L 103a).

- *Sentencing Proceedings*

On March 27, 2017, Mr. Hughes was sentenced in both his plea case and his trial case. For the plea file (Case No. 16-260213-FH), Mr. Hughes was sentenced consistent with his *Cobbs* agreement to concurrent terms of 36 months to 30 years, 12 to 24 months, and 24 months to 15 years. (App P 446a).

In this case, Mr. Hughes was sentenced to a term of 25 to 60 years. (App P 446a). His minimum term of 25 years was mandatory due to the application of the habitual offender statute. See MCL 769.12.

Appellate Proceedings

- **Court of Appeals**

On appeal, Mr. Hughes argued, among other things, that the cell phone records obtained from Mr. Hughes's phone "should have been excluded because the warrant was issued with regard to a separate criminal case, and the subsequent analysis of the data in regard to the present armed robbery case constituted a separate search for which no probable cause or warrant existed." *People v Kristopher Allen Hughes*, unpublished per curiam opinion of the Court of Appeals, issued September 25, 2018 (Docket No. 338030), p 3.[2] The Court of Appeals rejected this argument and denied his request for a new trial. *Id*. at 3-4.

The Court of Appeals analyzed the issue under the assumption "that the initial seizure of the cell phone and data was lawful pursuant to the August 12 search warrant." *Id*. at 3. Under this premise, the Court then characterized the issue before it as "whether the subsequent search of the cell phone requires a separate search warrant." *Id*. at 3. Since the data from Mr. Hughes' phone had already been obtained pursuant to a search warrant, and no challenge to the validity of that warrant was made, the Court concluded Mr. Hughes "had no reasonable expectation of privacy related to his cell phone after it had been seized and searched pursuant to a valid

[2] The Court of Appeals opinion is also attached as Appendix R.

search warrant, he cannot show how that data's use in this case constituted a violation of his Fourth Amendment rights." *Id*. at 3.

- **Supreme Court**

After the Court of Appeals affirmed his convictions, Mr. Hughes filed a pro per application for leave to appeal. (App 459a-508a). On November 1, 2019, this Court scheduled oral argument on the application and ordered the parties to file a supplemental brief to address the following issues: (1) whether the probable cause underlying the search warrant issued during the prior criminal investigation authorized police to obtain all of the defendant's cell phone data; (2) whether the defendant's reasonable expectation of privacy in his cell phone data was extinguished when the police obtained the cell phone data in a prior criminal investigation; (3) if not, whether the search of the cell phone data in the instant case was within the scope of the probable cause underlying the search warrant issued during the prior criminal investigation; (4) if not, whether the search of the cell phone data in the instant case was lawful; and (5) whether trial counsel was ineffective for failing to challenge the search of the cell phone data in the instant case on Fourth Amendment grounds. See *People v Kristopher Allen Hughes*, ___ Mich ___ (2019). In addition, this Court ordered the Oakland County Circuit to appoint the State Appellate Defender Office to represent Mr. Hughes in this Court. *Id*.

Summary of the Argument

Mr. Hughes asks this Court to vacate his convictions and remand this case for a new trial because the search warrant authorizing a forensic examination of his cell phone was not supported by probable cause, and the admission of the data and records obtained from the phone denied him a fair trial. Although the affidavit in support of the warrant states facts which may have authorized the search of his *home* for evidence of potential drug trafficking, there were no particularized facts connecting Mr. Hughes' phone to any criminal activity. Instead, in requesting judicial permission to search phones, Detective Matthew Gorman, stated "drug traffickers commonly use electronic equipment to aid them in their drug trafficking activities." (App E 38a-39a).

The bare assertion that drug dealers use cell phones and other electronic equipment to aid in their illegal activities fails to establish the particularized factual basis necessary to infer the phone to be examined was used in illegal conduct. At least 90% of Americans regularly use cell phones to communicate, to take photos and to store the records of their lives. *Riley v California*, 134 S Ct 2473 (2014) ("Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives – from the mundane to intimate."). At minimum, the warrant application must present some reliable evidence connecting Mr. Hughes' alleged criminal activity to the cell phone, and some specific facts from which it could be inferred that the phone had been used in drug trafficking or other criminal activity.

Those facts are completely missing. As a result, the search warrant for his home and phone issued during the investigation into drug trafficking activity did not authorize the police to obtain all of Mr. Hughes' cell phone data.

The fact that the phone associated with Mr. Hughes was recovered in a concurrent investigation also did not extinguish his reasonable expectation of privacy in the data obtained from the phone. Although the search warrant was initially targeted at drug trafficking, the execution of the warrant led to the discovery of an additional crime. Three weeks before the third trial in this case Mr. Hughes pleaded guilty to the drug trafficking charges and did not challenge the warrant in that case. Failing to challenge the warrant in the drug trafficking case, however, did not preclude Mr. Hughes's trial attorney, who represented him in both cases, from filing a motion to suppress the evidence obtained from his cell phone. Moreover, a rule forcing Mr. Hughes to potentially forego a favorable plea offer in the drug case and file a motion to suppress to maintain a reasonable expectation of privacy in the instant case would frustrate both the governments' and defendants' interest in resolving criminal cases in a timely manner.

Further, the Court of Appeals' reliance on *United States v Jacobsen*, 466 US 109 (1984) to deny Mr. Hughes relief and conclude he waived any expectation of privacy in the cell phone records was premised upon the assumption "that the initial seizure of the cell phone and data was lawful pursuant to the August 12 search warrant." *People v Kristopher Allen Hughes*, unpublished per curiam opinion of the Court of Appeals, issued September 25, 2018 (Docket No. 338030), p 3. The search

warrant, however, did not provide probable cause to search or seize Mr. Hughes's phone in connection with drug trafficking, armed robbery, or any other criminal offense.

The search of the cell phone data was also not within the scope of the probable cause underlying the search warrant issued during the concurrent criminal investigation into drug trafficking. This is so because, although the warrant may have provided cause to search Mr. Hughes's home, it did not justify the limitless search of Mr. Hughes's phone, or any other electronic devices found within the home, for drug trafficking or any other crime.

Due to the lack of a particularized basis to justify the intrusion into Mr. Hughes's phone, the search of the cell phone data in the instant case was not lawful. To be lawful, law enforcement was required to show probable cause and procure a valid warrant. While they may have satisfied the second requirement by obtaining a warrant, the affidavit in support of that warrant completely failed to establish a nexus between the Mr. Hughes's phone and any criminal activity. For the United States Supreme Court opinion in *Riley* to have any meaning, more is required than the bare assertion of law enforcement that alleged criminals use phones to conduct criminal activity.

Finally, trial counsel was ineffective for failing to challenge the search of the cell phone data on Fourth Amendment grounds. The evidence obtained from the phone associated with Mr. Hughes was the centerpiece of the allegations against him at trial. Outside of Lisa Weber, a witness who the prosecution conceded had serious

credibility concerns and whose testimony two juries expressly disbelieved, no other witness was able to identify Mr. Hughes as the individual who robbed Mr. Stites. To prove Mr. Hughes was the individual who committed the robbery and compensate for serious doubts about Ms. Weber's credibility, the prosecution focused its opening and closing statements on the importance of the text messages and call logs. Despite the significance of this evidence and the failure of the search warrant affidavit to state probable cause to search his phone for any crime, trial counsel failed to file a motion to suppress. Under these circumstances, trial counsel was ineffective. The remedy is a new trial.

I. The affidavit in support of the search warrant issued during the concurrent criminal investigation into drug trafficking did not authorize police to obtain all of the Mr. Hughes's cell phone data because it failed to establish probable cause to search or seize his phone in connection with drug trafficking, armed robbery, or any other criminal offense.

Issue Preservation

Mr. Hughes's trial attorney failed to file a motion to suppress. The issue is not preserved. *People v Carines*, 460 Mich 750, 774 (1999).

Standard of Review

Constitutional questions are reviewed de novo. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins. Services*, 475 Mich 363, 369 (2006).

Argument

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." US Const amend IV. Similarly, the Michigan Constitution provides, "No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation." Const 1963, art 1, § 11.

The privacy protections of the Fourth Amendment require a nexus between probable cause of criminal conduct and the property to be searched in order to allow law enforcement officials to invade an individual's privacy. *Illinois v Gates*, 462 US 213, 238 (1983)(the job of the court is to determine from the four corners of the

affidavit whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place."); *People v Landt*, 439 Mich 870 (1991)(adopting standard for evaluating warrants set forth in *Illinois v Gates*). Indeed, "[t]he critical element in a reasonable search is not that the owner of property is suspected of crime but that there is a reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v Stanford Daily*, 436 US 547, 556 (1978); see also *Nathanson v United States*, 290 US 41, 46 (1933) (holding that a warrant cannot be supported by "a mere affirmation of suspicion and belief without any statement of adequate supporting facts").

The Supreme Court has recently clarified any remaining doubt that the privacy protections of the Fourth Amendment – to be secure in one's house, papers and effects against unreasonable searches and seizure – US Const Amend IV, extend fully to the digital contents of one's cell phone. *Riley v California*, 134 S Ct 2473 (2014). That is so, not just because cell phones are used daily by over 90% of Americans, but because they contain "the privacies of life." *Id* at 2490, 2494-95.

As *Riley* emphasizes, courts must be as rigorous in requiring that requests for warrants to examine cell phones be supported by probable cause and establish a nexus between evidence of criminal activity and the contents of the cell phone, as they are for search warrant requests to search personal residences. *Id* at 2490. This is so because, as the *Riley* explained, a cell phone may contain even more private information than what can be found in an individual's home:

> In 1926, Learned Hand observed (in an opinion later quoted in *Chimel*) that it is "a totally different thing to search a

> man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." *United States v. Kirschenblatt,* 16 F.2d 202, 203 (C.A.2). If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

Riley, 134 S Ct at 2490–91 (emphasis in original).

Applying the principles in *Gates* and *Riley*, the Affidavit for Search Warrant in this case is patently insufficient and fails to include sufficient facts from which to infer a fair probability that contraband or evidence of a crime could be found in Mr. Hughes' cell phone. See *Gates*, 462 US at 23. An officer's assertion that, based on his training and experience, "drug traffickers commonly use electronic equipment to aid them in their drug trafficking activities" falls far short of meeting this rigorous standard.

Although the warrant involved sought to invade the privacy of the home, the case of *United States v Brown*, 828 F3d 375 (CA 6 2016), illustrates the proper application of the probable cause and particularity requirements of a warrant application. In *Brown*, the Sixth Circuit held that suppression was required of evidence obtained pursuant to a search because the affidavit in support of the warrant request "failed to establish the required nexus between the alleged drug trafficking and Brown's residence." *Id* at 385. And like the warrant affidavit in this case, the warrant in *Brown* was so lacking in probable cause that reliance upon in executing the warrant was unreasonable such that the Good Faith exception to the

exclusionary rule did not apply. *See United States v Leon*, 468 US 897, 922 (1984)(Evidence should not be suppressed if it was "obtained in objectively reasonable reliance" on the subsequently invalidated search warrant.").[3]

The *Brown* court explained that under the Fourth Amendment an "affidavit supporting a search warrant must demonstrate a nexus between the evidence sought and the place to be searched;" *id* at 385, and, that the connection "must be specific and concrete, not 'vague' or 'generalized." *Id*. That is, "[i]f the affidavit does not present sufficient facts demonstrating why the police officer expects to find evidence in the residence rather than in some other place, a judge may not find probable cause to issue a search warrant." *Id*.

In addition, in *United States v Lyles*, 910 F3d 787, 795 (CA 4, 2018), the Fourth Circuit addressed a warrant application similar to the one issued in this case and characterized as "astoundingly broad." Like the warrant in this case, it authorized the search of a laundry list of electronic devices but failed to specify any particularized facts connecting the phone recovered in the search to the alleged criminal activity. *Id*. at 794-795. Instead, the affidavit for the warrant merely asserted that the home where the phone was recovered was connected to drug trafficking because trash pulls revealed evidence of marijuana possession and distribution. *Id*. The *Lyles* court deemed this assertion insufficient to establish probable cause to search the phone because it lacked the required nexus between the thing to be searched and the alleged crime. *Id*. at 795. Due to the lack of any

[3] Our Supreme Court adopted the "good faith" exception to the exclusionary rule as set forth in *Leon* in *People v Goldston*, 470 Mich 523 (2004).

legitimate nexus, the *Lyles* court concluded "[a]t some point an inference becomes, in Fourth Amendment terms, an improbable leap." *Id*.

Another glaring deficiency in the search warrant affidavit here is its failure to even conclusively establish Mr. Hughes owned or possessed a cell phone or that one would likely be found inside the residence. The D.C. Circuit recently addressed a warrant with the same deficiency and, unsurprisingly, held it was deficient

> In view of the limited likelihood that any cell phone discovered in the apartment would contain incriminating evidence of Griffith's suspected crime, the government's argument in favor of probable cause essentially falls back on our accepting the following proposition: because nearly everyone now carries a cell phone, and because a phone frequently contains all sorts of information about the owner's daily activities, a person's suspected involvement in a crime ordinarily justifies searching her home for any cell phones, regardless of whether there is any indication that she in fact owns one. Finding the existence of probable cause in this case, therefore, would verge on authorizing a search of a person's home almost anytime there is probable cause to suspect her of a crime. We cannot accept that proposition.

United States v Griffith, 867 F3d 1265, 1275 (DC Cir. 2017).

The sufficiency of similar search warrants for phones have also been examined by state courts. For example, in *Commonwealth v White*, 475 Mass 583, 589 (2016), the Massachusetts Supreme Court addressed a warrant where the "decision to seize the defendant's cellular telephone was made because (a) they had reason to believe that the defendant had participated with others in the commission of a robbery-homicide and (b) their training and experience in cases involving multiple defendants suggested that the device in question was likely to contain evidence relevant to those

offenses." The Court concluded "[t]his, without more, does not satisfy the nexus requirement." *Id*. at 590.

The *White* Court explained that "[w]hile probable cause may be based in part on police expertise or on the practical considerations of everyday life, such considerations do not, alone, furnish the requisite nexus between the criminal activity and the places to be searched or seized." *Id*. at 591. The Court also warned that upholding such a warrant would essentially allow police to obtain a warrant in every criminal case by simply stating that, in their experience, individuals use phones to conduct criminal activity:

> In essence, the Commonwealth is suggesting that there exists a nexus between a suspect's criminal acts and his or her cellular telephone whenever there is probable cause that the suspect was involved in an offense, accompanied by an officer's averment that, given the type of crime under investigation, the device likely would contain evidence. If this were sufficient, however, it would be a rare case where probable cause to charge someone with a crime would not open the person's cellular telephone to seizure and subsequent search. See *Riley*, 134 S.Ct. at 2492 (only "inexperienced or unimaginative law enforcement officer ... could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone"). We cannot accept such a result, which is inconsistent with our admonition that "individuals have significant privacy interests at stake in their [cellular telephones] and that the probable cause requirement ... under both the Fourth Amendment ... and art. 14 ... [must] serve[ ] to protect these interests."

Id. at 591–592.

Here, it should be concluded that the allegations in the Affidavit for Search Warrant about Mr. Hughes's alleged involvement in drug trafficking activity and

Detective Gorman's statement that drug dealers generally use phones to "aid" them in their affairs, cannot "standing alone" give rise to a nexus that evidence of criminal conduct would be found on his phone. *Brown*, 828 F3d at 383.

More is required. At minimum, there must be some reliable evidence connecting Mr. Hughes's criminal activity to the cell phone and some specific facts showing that the phone had been used in drug trafficking. Those facts are completely absent here. As a result, the search warrant for his home and phone issued during the investigation into drug trafficking activity did not authorize the police to obtain all of the Mr. Hughes' cell phone data.

Further, like the cases listed above, the "good faith" exception to the exclusionary rule should not apply because the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 US at 923, citing *Brown v Illinois*, 422 US 590, 610-11 (1975)(Powell, J., concurring in part). There simply are no facts in the affidavit to support an inference or a connection to the allegations of criminal conduct. The warrant thus was not supported by probable cause.

II. Mr. Hughes's expectation of privacy in his cell phone records and data was not extinguished by his trial attorney's failure to file a motion to suppress in a concurrent criminal investigation that was resolved in a plea.

The fact that Mr. Hughes's cell phone was recovered in a concurrent investigation also did not extinguish his reasonable expectation of privacy in the data obtained from the phone. This is so for at least two reasons. Each of these reasons are addressed below.

A. Mr. Hughes had standing to challenge the validity of the warrant in either prosecution.

The Fourth Amendment of the United States Constitution and Article 1, § 11 of the 1963 Michigan Constitution, protect against unreasonable searches and seizures. To invoke the Fourth Amendment's protections, a defendant must first establish a legitimate expectation of privacy in the area searched. *Rakas v Illinois*, 439 US 128, 148-149 (1978); *People v Smith*, 420 Mich 1, 17-18 (1984) (adopting the *Rakas* "legitimate expectation of privacy" test). Moreover, the expectation of privacy must be one that society is prepared to recognize as reasonable. *Smith*, 420 Mich at 28. Courts must consider the totality of the circumstances in determining whether a defendant had a legitimate expectation of privacy in the area searched. *Id*.

Here, there is no question that Mr. Hughes' had ownership and possession of the cell phone obtained during the execution of the search warrant at the home. The phone, which was recovered from Mr. Hughes in the driveway of his home, had text messages addressed to him and pictures of him on it. Further, the prosecution used the evidence obtained from the phone to establish his identity at trial.

The fact that the execution of the warrant and subsequent forensic examination of the phone recovered from Mr. Hughes was initially targeted at different alleged criminal conduct did not diminish his privacy interest in the device. This is so because the execution of search warrants routinely yields other evidence unrelated to the initial crime being investigated. Mr. Hughes had the ability to challenge the validity of the warrant for his phone in either case, because the use of the cell phone data, which was procured without sufficient probable cause, violated his Fourth Amendment rights in each instance.

Furthermore, the fact that Mr. Hughes's trial attorney did not challenge the validity of the warrant in the drug trafficking case did not preclude him from challenging it in this case. First, Mr. Hughes, after consulting with his attorney, decided to forego trial and enter a no contest plea in his drug trafficking case. (App L 103a). As a result, although he could have contested the evidence, Mr. Hughes decided it was in his best interest to resolve the case in a plea deal. (App L 103a).

Second, because Mr. Hughes entered a plea, the evidence obtained from his phone was not testified to in open court by Detective Gorman. Therefore, because the information obtained from the forensic exam was not testified to in a hearing open to the public, Mr. Hughes retained a legitimate expectation of privacy in his cell phone data.

Moreover, a rule forcing Mr. Hughes to potentially forego a favorable plea offer in the drug case and file a motion to suppress to maintain a reasonable expectation of privacy in the instant case would frustrate both the governments' and defendants'

interest in resolving criminal cases in a timely manner. See *Lafler v Cooper*, 566 US 156, 170 (2012)("the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). Indeed, many individuals could lose the opportunity to take favorable plea offer in a case by filing motions to suppress to preserve their Fourth Amendment rights in a separate prosecution as many individuals are offered more favorable pleas during the early stages of criminal prosecutions.[4] Such a rule would also impose a cost on indigent defendants and defendants with retained counsel as they are routinely assessed attorney fees either by the court or their attorney for services provided to them.

B. The rule announced in *United States v Jacobsen* has no application to the facts of this case.

To support its holding that Mr. Hughes's Fourth Amendment rights were not violated, the Court of Appeals' relied on *United States v Jacobsen*, 466 US 109 (1984). *Jacobsen*, however, does not apply to the facts of this case.

In *Jacobsen*, Federal Express employees opened a cardboard box that had been inadvertently damaged. *Id*. at 111-113. The employees discovered plastic bags

[4] "[T]he prosecutor is most often willing to make the best bargain at a time when he does not have to invest the time and expense in various procedures, such as conducting a preliminary examination, pretrial motions, and trial preparation itself. It is an inducement to the prosecutor to avoid this kind of labor and, therefore, most often in the initial stages of the proceeding the opportune time for plea negotiations arises." See Robert L. Segar, *Plea Bargaining Techniques*, 25 Am Jur Trials 69, § 24 (Originally published in 1978)

containing white powder. *Id*. Believing the powder might be cocaine, the employees contacted a federal law enforcement officer. *Id*. Without first obtaining a warrant, the officer removed the plastic bags from the cardboard box and tested the powder, which proved to be cocaine. *Id*. In upholding the constitutionality of the officer's actions, the Supreme Court noted that "the container could no longer support any expectation of privacy, and ... it was virtually certain that it contained nothing but contraband." *Id*. at 120 n. 17.

First, the Court of Appeals' reliance on *Jacobsen* to conclude Mr. Hughes waived any expectation of privacy in the cell phone records was premised upon the assumption "that the initial seizure of the cell phone and data was lawful pursuant to the August 12 search warrant." *People v Kristopher Allen Hughes*, unpublished per curiam opinion of the Court of Appeals, issued September 25, 2018 (Docket No. 338030), p 3. The search warrant, however, did not provide probable cause to search or seize Mr. Hughes's phone in connection with drug trafficking, armed robbery, or any other criminal offense. See Issue I. As a result, the search and seizure of the phone was not lawful.

Second, unlike *Jacobsen*, the invasion of Mr. Hughes's was solely the product of state action. No private actors were involved in either the execution of the search warrant or the subsequent forensic examination of Mr. Hughes's phone.

Third, the privacy interests here are elevated far above those at issue in *Jacobsen*. As the Sixth Circuit stated in *United States v Allen*, 106 F.3d 695, 699 (CA 6, 1997), courts should be "unwilling to extend the holding in *Jacobsen* to cases

involving private searches of residences." In doing so, the *Allen* court recognized the difference between one's privacy interest in a residence and one's privacy expectation in an opened parcel and declined to stretch the private-search doctrine to residential searches, including police searches of hotel rooms premised on private employees' discoveries. *Id*. at 698–699; see also *United States v Williams*, 354 F3d 497, 510 (CA 6, 2003). Modern cell phones are a situation where the application of *Jacobsen* is improper. As the Supreme Court concluded in *Riley*, "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house." *Riley*, 134 S Ct at 2490–91 (emphasis in original). This Court, therefore, should reject the application of *Jacobsen* to searches of cellular phones.

III. The search of the cell phone data in the instant case was also not within the scope of the probable cause underlying the search warrant issued during the concurrent criminal investigation into drug trafficking.

The search of Mr. Hughes's cell phone data was not within the scope of the probable cause underlying the search warrant issued during the concurrent investigation into drug trafficking. As shown in Issue I, the search warrant for his electronic devices was deficient because it failed to establish a nexus between the alleged crimes and his cell phone. For this reason alone, the search of his cell phone for any purpose violated Mr. Hughes's Fourth Amendment rights. But the warrant was also invalid for an additional reason: its overbreadth in allowing the seizure of all electronic devices found in the residence. (App E 30a)

The Fourth Amendment requires that warrants "particularly describ[e]" the "things to be seized." US Const amend IV. That condition "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v Garrison*, 480 US 79, 84 (1987). Consequently, a warrant with an "indiscriminate sweep" is "constitutionally intolerable." *Stanford v Texas*, 379 US 476, 486 (1965).

In obligating officers to describe the items to be seized with particularity, the Fourth Amendment prevents "the issu[ance] of warrants on loose, vague or doubtful bases of fact." *Go-Bart Importing Co. v United States*, 282 US 344, 357 (1931). In that way, "the requirement of particularity is closely tied to the requirement of probable cause." 2 LaFave, Search & Seizure § 4.6(a). When a warrant describes the objects of

the search in unduly "general terms," it "raises the possibility that there does not exist a showing of probable cause to justify a search for them." *Id*. § 4.6(d).

The warrant in this case authorized police to search for and seize "any cell phones or computers or other devices capable of digital or electronic storage seized" during the execution of the search warrant to be "forensically searched and or manually searched, and any data that is able to be retrieved there from shall be preserved and recorded." (App E 30a). The affidavit, as explained in Issue I, failed to establish probable cause to suspect that any cell phones or other electronic devices belonging to Mr. Hughes and containing incriminating information would be found in the home. To add to this deficiency, the warrant further authorized the seizure of all electronic devices without regard to ownership and allowed the officers to search the devices without limitation.

The D.C. Circuit, in *Griffith*, when faced with a nearly identical warrant, concluded "blanket authorization to search for and seize all electronic devices" was overbroad and violated the Fourth Amendment. 867 F3d at 1276; see also *Lyles*, 910 F3d at 795 (characterizing a similar warrant as "astoundingly broad."). Similar to the warrant at issue in this case, the warrant in *Griffith* "included no express limitations on agents' authority to examine any electronic devices seized." 867 F3d at 1277.

The only conceivable way the evidence obtained from Mr. Hughes's phone fell within the scope of the warrant targeted at drug trafficking was because the scope of the search warrant for electronic devices was unlimited. Because the warrant placed no limits whatsoever on the types of devices that could be seized or any protocols for

conducting the forensic examinations of those devices, the warrant, as written, allows the search of those devices in their entirety without limitation. This is particularly troubling because, as the Court in *Riley* stated, "a cell phone search would typically expose to the government far more than the most exhaustive search of a house." 134 S Ct at 2490–91 (emphasis in original). Therefore, to the extent the search of Mr. Hughes's phone fell within the scope of the warrant, it was solely due to a lack of particularity.

IV. The search of the cell phone data in the instant case was not lawful.

The fourth question posed by this Court in its order granting argument on the application was "whether the search of the cell phone data in the instant case was lawful." See *People v Kristopher Allen Hughes*, ___ Mich ___ (2019). As argued in Issues I, II, and III, due to the lack of a particularized basis to justify the intrusion into Mr. Hughes's phone, the search of the cell phone data in the instant case was not lawful. To be lawful, law enforcement was required to obtain probable cause and a warrant. While they may have satisfied the second requirement by obtaining a warrant, that warrant completely failed to establish a nexus between the Mr. Hughes's phone and any criminal activity. For the United States Supreme Court opinion in *Riley* to have any meaning, more is required than the bare assertion of law enforcement that alleged criminals use phones to conduct criminal activity.

V. Trial counsel was ineffective for failing to file a motion to suppress the results of the forensic examination of Mr. Hughes's cell phone.

Issue Preservation

Trial counsel failed to file a motion to suppress or object to the introduction of cell phone evidence on Fourth Amendment grounds.

Standard of Review

The question of whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law. *People v Trakhtenberg*, 493 Mich 38, 47 (2012).

Argument

The right to the effective assistance of counsel is well-established in Michigan and federal jurisprudence. US Const, Ams VI, XIV; *Strickland v Washington,* 466 US 668, 686 (1984); Const 1963, art 1, § 20; *People v Pickens,* 446 Mich 298, 310-311 (1994). To prevail on a claim of ineffective assistance of counsel, a criminal defendant must first show that "counsel's performance fell below an objective standard of reasonableness," and that the defendant was prejudiced as a result. *Wiggins v Smith,* 539 US 510, 521 (2003); *People v Armstrong*, 490 Mich 281, 289-290 (2011).

To establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. A defendant need not show that counsel's error more likely than not affected the outcome. *Id.* The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if

the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. A reasonable probability is sufficient to undermine confidence in the outcome. *Id*. Additionally, as argued here,

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Kimmelman v Morrison, 477 US 365, 375 (1986).

For the reasons stated in Issues I, II, III, and IV, trial counsel's failure to file a motion to suppress the results of the forensic examination for Mr. Hughes's phone fell below an objective standard of reasonableness and, absent trial counsel's failure to file a motion to suppress this crucial evidence, there is a reasonable probability that the verdict would have been different. See *Morrison*, 477 US at 375.

Mr. Hughes's trial attorney served as counsel in all three trials and in the drug trafficking case that was resolved in a plea deal. Despite having familiarity with the case and three opportunities to file a motion to suppress the results of the forensic examination of Mr. Hughes's phone, trial counsel failed to file any motion. The failure to file such a motion was not the result of any trial strategy, as the cell phone provided the sole credible evidence that Mr. Hughes's could have been involved in the robbery. Indeed, in rebuttal, the prosecution even encouraged the jury to take the sole witness to identify Mr. Hughes, Ms. Weber, "out of the equation all together" when evaluating whether the evidence was sufficient to convict him due to her serious credibility

concerns. (App N 398a). For the prosecution, the cell phone removed all doubt as to the identity of the individual who committed the armed robbery. (App N 373a-379a; 401a-405a). As a result, outside of the deficiencies in probable cause and particularity outlined in Issues I, II, III, and IV, this is not a case where there was strategic reason to fail to object to the admission of these records on Fourth Amendment grounds.

The credibility concerns regarding Ms. Weber only heightened the prejudice resulting from the admission of Mr. Hughes's cell phone records and data. The first two trials ended in a mistrial. In each case, the primary reason the jury was not able to reach a verdict related to the credibility (or lack thereof) of Ms. Weber. (App J 75a; App K 85a). In the first trial the jurors sent a note stating "Mrs. [sic] Weber's testimony was not credible (according to some) and she was the only one to positively identify Mr. Hughes from that night." (App J 75a). In the second trial, the jury also sent a note listing their "concerns" about the evidence. (App K 85a). The first item on that list said "100% of Lisa W. testimony is untrue." (App K 85a). The notes from the first trial highlight the importance of the cell phone evidence in the third trial as the prosecution referred to Ms. Weber as a "disputed accomplice" and directly addressed the jury about the serious "concern[s]" about her credibility. (App N 140a; 373a-379a; 401a-405a).

The evidence obtained from Mr. Hughes's cell phone was the centerpiece of the allegations against him at trial. Outside of Lisa Weber, a witness who the prosecution conceded had serious credibility concerns and the believability of her testimony played a central role in the declaration of two mistrials, no other witness was able to

identify Mr. Hughes as the individual who robbed Mr. Stites. To prove Mr. Hughes's was the individual who committed the robbery and ease any concerns the jury may have had with Ms. Weber's testimony, the prosecution focused their opening and closing statements on the importance of the text messages and call logs. (App N 139a-143a; 373a-379a; 401a-405a). Despite the significance of this evidence and the failure of the search warrant to state probable cause to search his phone for any crime, trial counsel failed to file a motion to suppress. Under these circumstances, trial counsel was ineffective. The remedy is a new trial.

Summary and Request for Relief

Kristopher Hughes asks this Honorable Court to reverse his conviction and remand the case for a new trial.

Respectfully submitted,

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_____

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Date: February 26, 2020